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THE FEDERAL ADMINISTRATIVE PROCEDURE ACT: CODIFICATION OR REFORM?

LEGISLATIVE HISTORY

ON June 11, 1946, President Truman affixed his signature to the Administrative Procedure Act,¹ climaxing more than a decade of agitation by groups

1. Pub. L. No. 404, 79th Cong., 2d Sess. (June 11, 1946) (hereafter cited by section number only). For a chart of the Act's provisions see Appendix, *infra* p. 705. For other comments on the Act see Nathanson, *Some Comments on the Administrative Procedure Act* (1946) 41 ILL. L. REV. 368; Walkup, *The Administrative Procedure Act* (1946) 34 GEO. L. J. 457; Reich, *The Federal Administrative Procedure Act* (1946) 8 FED. B. J. 7; Blachly and Oatman, *The Federal Administrative Procedure Act* (1946) 34 GEO. L. J. 407; Blachly and Oatman, *Sabotage of the Administrative Process* (1946) 6 PUB. ADM. REV. 213. See also the following articles in the American Bar Association Journal: *The Federal "Administrative Procedure Act" Becomes Law* (1946) 32 A. B. A. J. 377; Gwynne, *The Architecture of the New Administrative Procedure Act* (1946) 32 A. B. A. J. 550; Sellers, *"Informal" Dispositions Under The Administrative Procedure Act* (1946) 32 A. B. A. J. 646; Sellers, *Exceptions as to the Administrative Procedure Act* (1946) 32 A. B. A. J. 749; McCarran, *Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review* (1946) 32 A. B. A. J. 827;

in and out of the legal profession for some sort of "reform" in federal administrative agencies. Fulsome praise was heaped upon the Act by the president of the American Bar Association,² which was most instrumental in pressing the legislation, and by many others.³

With the growth in number and importance of administrative bodies in the national government, created by the Roosevelt administration to carry out its program of economic and social change, came the growth of the demand that steps be taken to control the power of these agencies. In 1933 the American Bar Association appointed its first Special Committee on Administrative Law.⁴ The first specific proposal to come from this group was the bill for the creation of an administrative court.⁵ Following upon the heels of that proposal came the report of the 1938 Committee,⁶ containing the draft of a proposed bill, later known as the Logan-Walter Bill.⁷ Despite violent opposition from the administrative agencies,⁸ the Logan-Walter Bill was passed by Congress, but President Roosevelt vetoed the bill, remarking, among other things, that legislation designed to reform administrative procedure should await the report of the Committee appointed by the Attorney General to study the problem.⁹

The final report of the Attorney General's Committee¹⁰ in 1941 represents the outstanding survey of the administrative process in government agencies. In addition to a description and evaluation of the procedures

Findling, *NLRB Procedures: Effects of the Administrative Procedure Act* (1947) 33 A. B. A. J. 14; *The Agencies and the Administrative Procedure Act* (1947) 33 A. B. A. J. 16.

2. "For our day it is in many ways as important as the Judiciary Act of 1789 was in the founding of the Federal Government." Statement of Mr. Willis Smith, president of the American Bar Association, quoted in (1946) 32 A. B. A. J. at 377.

3. Sen. McCarran: ". . . I do not believe a more important piece of legislation has been or will be presented to the Congress of the United States than the one which I am trying in my humble way to explain to the Senate today. . . ." 92 Cong. Rec., March 12, 1946, at 2195. A letter to the members of the Chamber of Commerce of the State of New York from Mr. Arthur M. Reis, the chairman of its executive committee, July 25, 1946, hailed passage of the bill for "requiring these agencies for the first time to follow the same businesslike procedures which you and I find it necessary to follow in carrying on our personal and business affairs."

4. (1933) 58 A. B. A. REP. 197.

5. S. 3676, 75th Cong., 3d Sess. (1938).

6. (1938) 63 A. B. A. REP. 331.

7. S. 915, H. R. 6324, 76th Cong., 1st Sess. (1939).

8. See, e.g., the address by Judge Jerome Frank, then of the Securities and Exchange Commission, before the Georgetown Law Alumni Club, *Administrative Flexibility or Industrial Paralysis?* quoted in GELLHORN, *ADMINISTRATIVE LAW—CASES AND COMMENTS* (1940) 267 *et seq.*

9. H. R. Doc. No. 986, 76th Cong., 3d Sess. (1940) 3-4.

10. *Administrative Procedure in Government Agencies—Report of the Committee on Administrative Procedure, Appointed by the Attorney General*, SEN. DOC. NO. 8, 77th Cong., 1st Sess. (1941) (hereafter cited as the Final Report). The Committee also published a series of monographs which examined the procedure of individual agencies. SEN. DOC. NO. 186, 76th Cong. 3d Sess. (1940); SEN. DOC. NO. 10, 77th Cong., 1st Sess. (1941).

actually employed, the Final Report presented two bills, comprising the majority and minority proposals of the committee, which were introduced in the Senate.¹¹ The war brought to a halt further action on these proposals, but the present Act embodies many of the principal recommendations of the Final Report.¹²

Bills were introduced in Congress in 1944, which were the forerunners of the present Act.¹³ No action was taken in the 78th Congress, but the proposal was reintroduced in the 79th Congress in both the Senate and House.¹⁴ The judiciary committees of both houses carried on parallel work on the legislation, calling upon administrative agencies and private organizations and parties for their views and suggestions.¹⁵ These recommendations were embodied in revisions of the original text which appeared in a print issued by the Senate Committee.¹⁶ The House Committee held hearings June 21, 25, and 26, 1945, upon all administrative procedure bills which had been introduced.¹⁷ Further comment was sought by the Senate Committee on its revised text and was analyzed by its staff, which published a second, more elaborate print in June, 1945, with references and explanations.¹⁸ Finally the bill was reported out of the Senate Committee and unanimously passed by the Senate after very little debate,¹⁹ in contrast to the violent opposition to the earlier bills. The House Committee made some minor changes,²⁰ after which the House approved the legislation,²¹ and the Senate concurred in the modifications.²² Both of these actions were likewise by unanimous vote.²³

A variety of material is available to assist in the construction of the many

11. S. 674, 675, and 918, 77th Cong., 1st Sess. (1941).

12. The Attorney General's Committee recommended increased public information, opportunity for presentation of views by interested persons in rule making, separation of functions in formal adjudication, and independent hearing examiners, with more extensive powers. Final Report 25-9, 102, 55-60, 43-53. "The published documents relating to the present bill . . . indicate the care with which the recommendations of that committee have been studied in framing the present bill." H. R. REP. NO. 1980, 79th Cong., 2d Sess. (1946) 12.

13. S. 2030, H. R. 5081, 78th Cong., 2d Sess. (1944).

14. S. 7, H. R. 1203, 79th Cong., 1st Sess. (1945).

15. H. R. REP. NO. 1980, 79th Cong., 2d Sess. (1946) 14.

16. SEN. REP. NO. 752, 79th Cong., 1st Sess. (1945) 5. The committee prints were not published as government documents, but were made available for study in connection with this comment.

17. *Hearings before the Committee on the Judiciary on Federal Administrative Procedure and on H. R. 184, H. R. 339, H. R. 1117, H. R. 1203, H. R. 1206, and H. R. 2602*, 79th Cong., 1st Sess. (1945).

18. SEN. REP. NO. 752, 79th Cong., 1st Sess. (1945) 5. Senate Judiciary Committee Print of S. 7 (June, 1945) (hereafter referred to as Senate Committee Print).

19. 92 Cong. Rec., March 12, 1946, at 2208.

20. H. R. REP. NO. 1980, 79th Cong., 2d Sess. (1946) 49 *et seq.*

21. 92 Cong. Rec., May 24, 1946, at 5773.

22. 92 Cong. Rec., May 27, 1946, at 5924.

23. For a suggestion that all was not so smooth as the vote indicates, see Blachly and Oatman, *supra* note 1, 6 PUB. ADM. REV. at 226 n.

ambiguous features of the Act.²⁴ Both the Senate and the House Judiciary Committees presented extensive reports on the bill.²⁵ In the course of the debate on the floor of the House, the chairman of the subcommittee in charge of the bill presented a lengthy statement of its purpose and operation.²⁶ An unusual feature of the legislative history of the Act is that the Attorney General presented his views of the meaning and probable effect of each section of the bill, prior to its passage.²⁷ Since this letter was appended to the Report of the Senate Committee, it may be argued that the legislators adopted it as an interpretation of the legislation, and thus is indicative of the legislative intent.

The Act appears to represent a blend of three conflicting purposes. In some respects it is simply a codification of existing law and practice;²⁸ in others it prescribes a program of change addressed to agency discretion and good faith;²⁹ and in other respects it is a statement of new law and standards of procedure to be enforced by the courts.³⁰ In many sections of the Act it is difficult to discern which of these three purposes is intended.³¹ To resolve these ambiguities, recourse to the legislative history will demonstrate that the determination of legislative intent will apparently vary with the source chosen as authoritative. In almost every case the opinion of the Attorney General (representing the agencies, it seems) favors an interpretation that the Act codifies existing practice or is addressed to agency discretion, whereas the interpretation of Representative Walter is that the Act prescribes new standards to be enforced by the courts. The two committee reports do not offer much aid in construction of the more controversial sections. It is not surprising that those sponsoring the legislation should favor a construction that would establish new standards of law; and conversely those whom the Act is designed to control would favor making it as weak as possible.

24. Of unusual utility is *Administrative Procedure Act: Legislative History, 79th Congress, 1944-46* (1946) SEN. DOC. NO. 248, 79th Cong., 2d Sess. It contains the Act, the Senate Committee Print, the Senate and House Reports, proceedings from the Congressional Record in regard to the Act, and a complete index by section.

25. SEN. REP. NO. 752, 79th Cong., 1st Sess. (1945); H. R. REP. NO. 1980, 79th Cong., 2d Sess. (1946) (hereafter cited as Senate Report and House Report).

26. Statement of Rep. Francis E. Walter, 92 Cong. Rec., May 24, 1946, at 5752 *et seq.*

27. Senate Report App. B.

28. *E.g.*, "No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law." Sec. 9(a).

29. *E.g.*, "Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives." Sec. 6(a).

30. *E.g.*, "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . . [n]o officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review. . . ." Secs. 5, 5(c).

31. Secs. 6(c), 7(c), discussed *infra* pp. 688, 690.

There are certain changes brought about by the Act, principally in the requirements relating to public information and formal adjudication, particularly the provision for appointment of semi-independent trial examiners under the supervision of the Civil Service Commission—but it is not believed that they are of so far-reaching a nature as to justify the laudatory expressions to which reference has been made.³² Much of the Act is simply a codification of existing law or an expression of legislative preference for one mode of procedure over another, to which the agencies are to adhere so far as in their discretion and good faith they are able. Of course, the effect upon agency practice of moral suasion should not be lightly dismissed. The Final Report of the Attorney General's Committee had an immediate, though limited, effect on administrative procedure; and even though it is held by the Supreme Court that the Act does not prescribe new standards of conduct which are enforceable in the courts, the agencies will presumably be anxious to comply with the intent of Congress as unanimously expressed.³³ Moreover, where the Act is not entirely clear as to enforceability, agencies will generally comply in order to avoid the risk of litigation.

REQUIREMENTS FOR THE FOUR TYPES OF PROCEEDINGS

The Act defines four types of agency action, setting up procedural requirements purported to be fundamentally different for each. The types are defined by means of two distinctions, one between rule making and adjudication³⁴ and the other between formal proceedings and informal proceedings (that is, between proceedings where decisions must be confined to a hearing

32. See notes 2 and 3 *supra*. Compare with those laudatory remarks the cautious note sounded by Mr. Louis G. Caldwell of the District of Columbia bar, who was chairman of the American Bar Association's first Special Committee on Administrative Law in 1933, "[The bill] is a very modest program of reform, an almost irreducible minimum. . . . Any viewing with alarm might logically be expected from those who feel that the bill does not go far enough, hardly from those who favor a minimum of restriction on the administrative process. . . . Furthermore, every important sentence is hedged with exceptions and qualifications so as to seem to take care of any situation about which there is legitimate doubt." From an address before the National Association of Women Lawyers, Feb. 7, 1945, printed in (1945) 12 J. BAR ASSOC. D. C. 59, 74.

33. That Congress may be amenable to further curbs on administrative agencies is indicated by an address by Senator McCarran before the 69th annual meeting of the American Bar Association in Atlantic City, Oct. 30, 1946. The Chairman of the Senate Judiciary Committee stated that "measured experience might indicate need for revision of the present administrative system entirely." N. Y. Herald Tribune, Oct. 31, 1946, p. 14, col. 1. See also Senate Report at 30.

34. Secs. 2(c), (d). See also House Report at 17: "In stating the essentials of the different forms of administrative proceedings, the bill carefully distinguishes between the so-called legislative functions of administrative agencies (where they issue general regulations) and their judicial functions (in which they determine rights or liabilities in particular cases). It provides quite different procedures for the 'legislative' and 'judicial' functions of administrative agencies."

record and where decisions need not be so confined).³⁵ The four types are (1) informal rule making, (2) formal rule making, (3) formal adjudication, and (4) informal adjudication.³⁶

Before attempting to analyze the two distinctions, the Act's procedural requirements for each of the four types will be examined. It is important to discover just where the Act sets forth new law and where it lays down standards addressed to agency discretion or merely codifies existing law. The provisions are set out graphically in the appendix to this comment.

Informal Rule Making. Except where the agency finds them inappropriate, notice and opportunity to participate must precede substantive rule making of every variety.³⁷ "Participation" may be limited to a written statement. The statement must be considered by the agency, but it is doubtful whether the courts will go far in investigating whether a particular document has been considered.³⁸ All substantive rules must include a state-

35. Secs. 4(b), 5.

36. Examples are: informal rule making: formulating labeling regulations for alcoholic beverages under the Federal Alcohol Administration Act § 5(e), 49 STAT. 982 (1935), 27 U. S. C. § 205(e) (1940); formal rule making: regulating food standards under the Federal Food, Drug, and Cosmetic Act § 701(e), 52 STAT. 1055 (1938), 21 U. S. C. § 371(e) (1940); formal adjudication: determination of unfair labor practices by the NLRB under the National Labor Relations Act § 10, 49 STAT. 453 (1935), 29 U. S. C. § 160 (1940); informal adjudication: determination of veterans' claims under the Act of March 20, 1933, Title I, § 9, 48 STAT. 10 (1933) [as amended 48 STAT. 525-6 (1933)], 38 U. S. C. § 709 (1940).

37. Section 4 reads in part: "(a) Notice.—General notice of proposed rule making shall be published. . . . Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(b) Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. . . ." The House Report paraphrased the exceptions in Section 4(a) as meaning all but substantive rules. House Report at 24. So did the Senate Committee Print (at 6). "Substantive" is defined neither in the Act nor in the committee reports. The Senate Committee Print (at 6) stated that its meaning was established in law; it is usually considered as meaning those rules which are legally binding on the persons to whom they are addressed. Final Report 98-100. Examples given of "substantive rules" support this interpretation. Rep. Walter, 92 Cong. Rec., May 24, 1946, at 5755 ("price regulations"). House Report at 22 ("statement of standards"). The new requirement would apply, for example, to the issuance of tax regulations by the Bureau of Internal Revenue, heretofore issued without any prior notice.

As to whether the requirements of participation may be omitted, see note 39 *infra*.

See Nathanson, *supra* note 1, at 384, for a discussion of the extent to which agencies are likely to omit these public procedures.

38. Section 8(b) calls for "consideration" of exceptions to intermediate decisions. Interrogatories, virtually the only method of determining "consideration," have generally

ment of "basis and purpose." This is new law, but apparently may be omitted if no notice is given.³⁹ No substantive rule may go into effect until thirty days after its publication or service upon all affected parties.⁴⁰ The time requirement may be omitted, though, for "good cause."

The requirement that general rules which are not of legal effect—descriptions of organization and procedure and policy statements—be published is clearly new law.⁴¹

Formal Rule Making. In formal rule making there are the same provisions for notice and publication, or service, as in informal rule making. Participation, in contrast with informal rule making, is guaranteed, but only to "parties."⁴² A "party" is defined only as one "entitled as of right to be admitted as a party."⁴³ The right to become a party must be found in the statute governing the particular agency. Each "party" is entitled to submit evidence and cross-examine,⁴⁴ usual rights of "parties" as defined under existing statutes.⁴⁵

not been granted, despite the first Morgan decision [*Morgan v. United States*, 298 U. S. 468 (1936)]. As regards the NLRB, for example, an interrogatory was granted in *NLRB v. Cherry Cotton Mills*, 98 F. (2d) 444 (C. C. A. 5th, 1938), but it was denied in *NLRB v. Botany Worsted Mills*, 106 F. (2d) 263 (C. C. A. 3d, 1939); *Cupples Co. v. NLRB*, 103 F. (2d) 953 (C. C. A. 8th, 1939); *NLRB v. Biles Coleman Lumber Co.* 98 F. (2d) 16 (C. C. A. 9th, 1938).

39. See *supra* note 37. Whether the requirements of participation and publication with "basis and purpose" stated are governed by Section 4(a) is not clear from the statutory language, nor entirely clear from the committee reports. The Senate Committee reported that Section 4(a) "governs the application of the public procedures required by" Section 4(b). Senate Report at 14. The same was stated in the Senate Committee Print (at 6) except for the word "public." The requirement of publishing reasons is part of the same sentence which prescribes participation. The Senate Committee also reported that Sections 4(c) and 4(d) applied whether or not public procedures were dispensed with—implying that both requirements of Section 4(b) applied only when public procedures are used. *Ibid.*

40. Secs. 3(a), 4(c). The Federal Register Act already requires publication of all legally enforceable general rules before they take effect. Secs. 5(a), 7, 49 STAT. 501, 502 (1935), 44 U. S. C. §§ 305(a), 307 (1940). See 1 C. F. R. §§ 2.2-3 (1938). It is unlikely that substantive rules are more broadly defined in this Act than in the Federal Register Act. In the Senate Committee Print (at 3) it was stated: "The definition of rule making and rule follows essentially the definitions of the Federal Register Act. . . ." *Accord:* Rep. Walter, 92 Cong. Rec., May 24, 1946, at 5755. As to the confusing House additions of "particular applicability" and "future effect," see *infra* note 66.

41. Some doubt may arise as to the requirement of publication of SEC advisory opinions as to the legality of specific transactions, but since the publication requirements apply only to those interpretive rules formulated "for guidance of the public," advisory opinions on a specific fact situation probably need not be published. Sec. 3(a). See statement of Rep. Walter, 92 Cong. Rec., May 24, 1946, at 5755. The SEC objected to the possibility of compulsory publication, said it would virtually stop issuing advisory opinions if they had to be published. A cautionary view as to the value of such broad publication requirements as the Act contains is found in Nathanson, *supra* note 1, at 381.

42. Secs. 4(b), 7, 8.

43. Sec. 2(b).

44. Sec. 7(c). The agency may permit only written evidence in some cases.

45. See *FCC v. National Broadcasting Co.*, 319 U. S. 239, 242-6 (1943); *Red River*

The position of the trial examiner is set forth at length. The powers he is given, such as to "dispose of procedural requests," are all new law, but in most instances duplicate pre-existing agency practice. It is a new requirement that trial examiners be appointed, promoted, or discharged under supervision of the Civil Service Commission. Section 11 describes the procedure and will be discussed below.

Decisions must be made on "reliable, probative, and substantial evidence." In reviewing agency action courts will probably interpret this to mean no change in existing criteria.⁴⁶

New legal standards are set forth in the requirement that there must be an intermediate decision in all cases, but even here agencies may omit the intermediate decision in special cases.⁴⁷ If there is an intermediate decision, parties may propose findings and make exceptions—new requirements, but in accordance with most agency practice in formal proceedings.⁴⁸

Formal Adjudication. For formal adjudications, the Act sets up its strictest procedural requirements.⁴⁹ The content of notice to those affected is specified; it restates existing law.⁵⁰ The hearing of formal adjudication is exactly the same as that in formal rule making with two exceptions—the separation of functions and the intermediate decision. By separation of functions is meant that in any proceeding those who prosecute or investigate may not associate in any way with the trial examiner.⁵¹ The intermediate decision is different in that it must be written by the trial examiner and may not be omitted.⁵²

There may be some question as to whether a party may waive any of the requirements of formal adjudication. Since the general approach of Congress, as indicated in the committee reports,⁵³ was to protect those affected by agency action, it seems likely that all persons affected by a prospective agency action could waive the procedural requirements of the Act. A provision in the Act to this effect would have prevented overcautious agencies from deciding they must not deviate from the Act's procedures though the persons involved are willing to waive some of them.

Broadcasting Co. v. FCC, 98 F. (2d) 282, 285 (App. D. C. 1938). Statutes themselves do not generally define "party."

46. See discussion *infra* pp. 690-1.

47. Sec. 8(a). This subsection reads in part: "... in rule making . . . any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires."

48. Sec. 8(b) reads in part: "Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit" findings, exceptions, etc.

49. Secs. 5, 7, 8. For a discussion of § 5(d) on declaratory orders see Nathanson, *supra* note 1, at 397-401.

50. GELLBORN, *supra* note 8, at 461 *et seq.*, esp. 469.

51. Sec. 5(c). Cf. Nathanson, *supra* note 1, at 388.

52. Secs. 5(c), 8(a).

53. Senate Report at 5. House Report at 16.

Informal Adjudication. The Act lists no procedural requirements which specifically apply to informal adjudication. Only the general requirements, discussed below,⁵⁴ have any application.

EFFECT OF RULE-MAKING-ADJUDICATION DISTINCTION

Formal Proceedings. In settling the question of whether formal proceedings are rule making or adjudication, the conceptual distinction between the two is of limited application. Undoubtedly realizing the impossibility of satisfactorily classifying many formal proceedings such as ICC rate making and FCC radio-station licensing, the legislators settled the question in many instances by specific enumerations and exceptions. Many proceedings are in terms defined as rule making or adjudication. Another group are exempted from the requirements which differentiate the procedures of formal rule making and formal adjudication—principally the separation of functions—so that it does not matter whether they are called rule making or adjudication.

Licensing is specifically defined as adjudication.⁵⁵ But initial licensing proceedings, such as those where the ICC, FCC, or CAB issue certificates of public convenience and necessity, are exempted from all the distinctive procedural requirements of formal adjudication⁵⁶—in other words, are placed in exactly the same category as formal rule making. Enumerated as rule making are rate making, price fixing, wage fixing, and matters relating to corporate structure.⁵⁷ Specifically excluded from the provisions requiring separation of agency functions are matters concerning carriers and public utilities.⁵⁸

Where the conceptual distinction between rule making and adjudication must be employed to settle the question of separating functions, only two agencies have been noted which make rules in formal proceedings and are therefore exempt. Those agencies are the Food and Drug Administration when prescribing food standards⁵⁹ and the Department of Agriculture when making rules under the Agricultural Marketing Agreement Act⁶⁰—proceedings where technical food problems are particularly important.

The extensive enumerations and exceptions, with a resulting limited application of the conceptual distinction between rule making and adjudica-

54. See *infra* p. 687 *et seq.*

55. Sec. 2(d).

56. Separation of functions—§ 5(c); intermediate decisions—§ 8(a); written evidence—§ 7(c).

57. “. . . the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing.” Sec. 2(c).

58. “. . . proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers.” Sec. 5(c).

59. See *supra* note 36.

60. 50 STAT. 246 (1937), 7 U. S. C. § 608(c)(4) (1940).

tion, place formal hearing procedures in a different light. Technical proceedings have been accorded the less strict procedures of rule making—where decisions must be based on interpretation of masses of economic and technical data, rather than on the unraveling of conflicting testimony as to what a certain person has done.⁶¹

Informal Proceedings. Notification, by service or publication, is the only distinctive requirement of informal rule making over informal adjudication which may not be omitted if the circumstances warrant. With so little difference in strict requirements there would seem to be no strong reason for employing what is confessedly a difficult conceptual distinction between rule making and adjudication. A person is usually notified in some way of any agency action which affects him. To require notification in some form in all informal proceedings would not burden agencies. It would mean some additional protection to private rights and would obviate need for the conceptual rule-making-adjudication distinction in informal proceedings. The other rule-making requirements—prior notice, participation, publication of “basis and purpose,” and delay before a rule takes effect—could without burden be extended to informal adjudication, since they only apply to agency action which is substantive (*i.e.*, of legal effect) and can be omitted if the circumstances warrant.

DISTINGUISHING RULE MAKING FROM ADJUDICATION

Despite the small practical significance of the conceptual rule making-adjudication distinction, there will be cases in which it is important, and it is therefore appropriate to examine the conceptual distinction between the two types of agency proceedings—a difficult task because of the obscurities in the text of the Act and the interpretative documents.

Under the Act a rule is (1) a statement, (2) of general or particular applicability, (3) of future effect, (4) “designed to implement, interpret, or prescribe law or policy.”⁶² An order (the result of adjudication) is the “final disposition” of any matter other than rule making and may be “injunctive” or “declaratory.”⁶³ The definitions are exclusive.⁶⁴

61. Such was the view of the Attorney General: “Proceedings are classed as rule making under this act not merely because, like the legislative process, they result in regulations of general applicability but also because they involve subject matter demanding judgments based on technical knowledge and experience.” Senate Report at 39. A blanket requirement of the separation of functions with exception made to enumerated categories too technical feasibly to permit such separation would eliminate the need for such a conceptual distinction. A provision that an agency could declare certain types of cases too technical for the separation of functions would be subject to judicial review for abuses and would prevent extensive litigation as to whether in a particular situation an agency must separate its functions.

62. Sec. 2(c).

63. Sec. 2(d).

64. House Report at 20: “The term ‘order’ is essentially and necessarily defined to exclude rules.” Senate Report at 11: “The term ‘order’ is defined to exclude rules.”

The trouble with the definitions is that any action fits both definitions.⁶⁵ That rules must be of future effect supplies no distinction, for orders may be both "injunctive" and "declaratory." In actuality all agency action takes effect in the future. By any plain language test the distinction is meaningless.⁶⁶

To find a useful distinction one must look to the legislative intent. A partially adequate line is found where courts have delineated between agency action which must be preceded by notice and full hearing and agency action not so required. Courts have with regularity termed the first type "judicial" and the second type "legislative,"⁶⁷ though writers have questioned the utility of the classification.⁶⁸ Despite the fact that the labels have nothing to do with court decisions and that cases employing the labels cannot be reconciled on any such conceptual level, many parts of the legislative

65. *E.g.*, an NLRB cease and desist order, presumably the result of adjudication, is injunctive and final, so that it could be an order. Yet since the order is also a "statement," "interpreting" the Wagner Act, of "particular applicability" to an employer, of "future effect" in ordering such action as dissolution of a company union, it could also be a rule.

66. That a rule could be of particular applicability and had to be of future effect was added in the House version of the bill. In early versions rule making was general, adjudication particular, on its face a more orthodox distinction. House Report at 49. Fuchs, *Procedure in Administrative Rule-making* (1938) 52 HARV. L. REV. 259, 263-5. The House Committee purportedly added the two phrases to clarify the distinction, not to change it. House Report at 49n. Rep. Walter, 92 Cong. Rec., May 24, 1946, at 5755. Despite their additions the House Committee continued to refer to rules as "general regulations." House Report at 17. For perhaps the only way to regard these definitions see Nathanson, *supra* note 1, at 373-7.

67. The Assigned Car Cases, 274 U. S. 564, 583 (1927): "In the case at bar, the function exercised by the Commission is wholly legislative" (distinguishing a prior case demanding stricter rules of evidence as "quasi-judicial"). *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 305 (1933): The tariff matter was a "delegation . . . of the legislative process" (secret evidence could be considered); see (1933) 33 COL. L. REV. 528; (1933) 81 U. PA. L. REV. 764. *State ex rel. State Board of Milk Control v. Newark Milk Co.*, 118 N. J. Eq. 504, 523, 179 Atl. 116, 126 (1935): "Such regulation is purely a legislative function" (no notice necessary before a milk price order). *Lexington v. Bean*, 272 Mass. 547, 551, 172 N. E. 867, 869 (1930): "The by-law was *quasi* legislative in character . . ." (notice and hearing not required before a local zoning ordinance was passed). See GELLHORN, *op. cit. supra* note 8, at 360-3.

68. Hankins, *The Necessity for Administrative Notice and Hearing* (1940) 25 IOWA L. REV. 457, 463: "The language typically used by courts when deciding that notice and hearing are necessary in a given situation is such words as 'judicial' or 'quasi-judicial.' If, on the other hand, they are deciding that notice and hearing are not necessary, they may employ the terms 'legislative' or 'quasi-legislative.' Such judicial name-calling seems to me a mere verbal gloss, employed only after the actual decision is made." Davis, *The Requirement of Opportunity to be Heard in the Administrative Process* (1942) 51 YALE L. J. 1093, 1112: "[T]he attachment of separation-of-powers labels to functions is an evasion rather than a solution." Holmes, J., in *Southern Ry. v. Virginia*, 290 U. S. 190, 197 (1933): Even if the legislature could have made the order, "[t]here is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence" (order to remove a grade crossing, made without prior hearing, declared invalid). See also Note (1934) 34 COL. L. REV. 332.

history point clearly to a Congressional intent to peg the definitions of rule making and adjudication to these very labels, "legislative" and "judicial," as they have been used by the courts.⁶⁹

For most agency actions the labels of "legislative" and "judicial" can be attached by inspection of the decided cases. For the doubtful situations legal writers have postulated a number of means of predicting judicial response to any particular type of agency action.⁷⁰ These postulates usually call for consideration of (1) the number of persons affected, (2) the magnitude of the effect on the persons concerned, and (3) the urgency of public need for immediate action.⁷¹

The test suggested by the "legislative"- "judicial" labels fails in the case of action labeled "legislative" (*i.e.*, not requiring prior notice and full hearing) which applies to named individuals. The legislative history of the Act indicates that the term rule making is not to include all such agency action, and suggests that where "legislative" action applies to named persons rather than generally, it will be termed adjudication.⁷²

69. House Report at 17. Senate Report at 7. Rep. Walter: "[W]e speak of rule or rule making whenever agencies are exercising legislative powers. We speak of orders and adjudications when they are doing things which courts otherwise do." 92 Cong. Rec., May 24, 1946, at 5755. A cease and desist order (*supra* note 65) is certainly adjudication under the following, which refers only to adjudication: "'Injunctive' action is a common determination of past or existing lawfulness, although the remedy or sanction is in form cast as a command or restriction for the future rather than as a fine, assessment of damages, or other present penalty." House Report at 20. See statement of Acting Attorney General Biddle at the Senate Judiciary Committee hearings on the proposed bills: "First, there is the rule-making process. . . . Second, there is the adjudicatory process . . . rule making is essentially a legislative function." *Hearings before a Sub-Committee of the Committee on the Judiciary on S. 674, 675, and 918, 77th Cong., 1st Sess. (1941) 1445-6.*

A member of the House Committee on the Judiciary has recently expressed a similar view that the distinction is to be found in court decisions. Gwynne, *supra* note 1, at 551.

70. Hankins, *supra* note 68, at 463 *et seq.*; Fuchs, *supra* note 66, at 260-5; Davis, *supra* note 68, at 1112 *et seq.*; Timberg, *Administrative Findings of Fact (1941)* 27 WASH. U. L. Q. 62, 76 *et seq.*, esp. 82; Comment (1942) 55 HARV. L. REV. 427, 490-1.

71. For (1) and (3) the greater is the number or urgency the more likely is it that the label will be "legislative"; (2) works vice versa.

72. The Senate Judiciary Committee spoke of administration of veterans' claims as adjudication, though they have been held a matter of "legislative" grace. Senate Committee Print at 8. *Van Horne v. Hines*, 122 F. (2d) 207 (App. D. C. 1941), *cert. denied*, 314 U. S. 689 (1941). Such an interpretation tends to make surplusage of the word added by the House, of "particular" effect, except when a general regulation affects only one person merely because no other person is at the moment in the same status, a situation likely to occur but seldom. No examples of rules of particular effect have been found in the legislative history of the Act. See *supra* note 66.

The inadequacies of this or any test show up in classification of the handling of veterans' claims. Traditionally adjudication, they are placed by inference in the class of formal adjudication by Section 7(c), where it is stated that in formal adjudications which determine claims for "benefits" evidence may be entirely written. Yet courts are compelled to call such proceedings "legislative" to justify the statutory exclusion of judicial review. The proceedings may be likened to private bills in Congress. *Van Horne v. Hines*, *supra*. The

DISTINGUISHING FORMAL FROM INFORMAL PROCEEDINGS

Formal hearing procedures are set down in the Act to apply to agency action, whether rule making or adjudication, whenever "required by statute to be made [or 'determined'] on the record after opportunity for an agency hearing."⁷³ This might appear to be a simple and clear line to draw between types of agency proceedings. But an inspection of statutes governing agency action reveals very few agencies which, by a literal reading of their governing statutes, are required to make their determinations upon the record of a hearing. The Food and Drug Administrator "shall base his order only on substantial evidence of record at the hearing."⁷⁴ The National Labor Relations Act requires that decisions in unfair labor practices cases be made "upon all the testimony taken" at the hearing.⁷⁵

A larger group of agencies, including the SEC, FPC, and FCC, comes under the formal procedure requirements of the Act by only a slightly broader interpretation, because of review provisions in their governing statutes which require the reviewing court to confine its review to the record adduced at a hearing before the agency.⁷⁶ The agency must be able to justify its order on the record or the order will fall, so that in effect it is compelled to include in the hearing record all matter forming the basis of its order. In line with this implied requirement agencies of this group have often specified in their rules of practice that determination shall be made solely on the hearing record.⁷⁷

resulting dispositions fit the definitions of both rule and order, though it could be said that they are not final. *United States v. Gudewicz*, 45 F. Supp. 787 (E. D. N. Y. 1942). For further difficult examples see *infra* p. 699 *et seq.*, on the classification of Immigration Service functions.

73. Secs. 4(b), 5. The word "determined" is used for adjudication, "made" for rule making.

74. See *supra* note 36.

75. Sec. 10(c), 49 STAT. 454 (1935), 29 U. S. C. § 160(c) (1940). Federal Trade Commission Act § 5, 38 STAT. 719 (1914), 15 U. S. C. § 45(b) (1940): "The testimony . . . shall be reduced to writing. . . . If upon such hearing the commission shall be of the opinion. . . ." Agricultural Marketing Agreement Act of 1937 § 1(e), 50 STAT. 246 (1937), 7 U. S. C. § 608c(4) (1940): "[T]he Secretary of Agriculture shall issue an order if he finds . . . upon the evidence introduced at such hearing. . . ."

76. The statutes provide for a mandatory hearing, the evidence before the reviewing court being only the record of the hearing and of any additional hearing before the agency which the reviewing court may order, and the agency's findings being conclusive "if supported by evidence." Securities Act of 1933 §§ 8(d), 9(a), 48 STAT. 80 (1933), 15 U. S. C. §§ 77h(d), 77i(a) (1940) (SEC stop orders). Public Utility Act of 1935 §§ 205(e), 313(b), 49 STAT. 852, 860 (1935), 16 U. S. C. §§ 824(e), 825 (b) (1940) (FPC rate making).

77. Rules of Practice under the Packers and Stockyards Act, 9 C. F. R. § 202.20(a) (Cum. Supp. 1943): "[T]he Secretary, upon the basis of and after due consideration of the record, shall prepare his order. . . ." In apparent recognition of the Act's applicability are the revised Rules of Practice of the Securities and Exchange Commission, issued on the day the Act went into effect, 11 FED. REG. 177A-726 (1946) [designated 17 C. F. R. § 201.12(b)]: "[T]he Commission shall determine the matter on the record, any briefs of the parties, and any oral argument before the Commission."

A third group of agencies are governed by statutes which require that action be taken "after full hearing,"⁷⁸ not "until a hearing shall have been granted,"⁷⁹ or the like,⁸⁰ with no review provisions as in the second group. With this group may be included agencies whose statutes have been interpreted by courts to require a hearing before agency action, though the statutes do not in terms so provide. Among the statutes covering agencies noted, only the immigration statutes, as regards deportation and fines proceedings, have been so interpreted specifically.⁸¹ Other statutes may well be subject to the same interpretation.⁸²

First glance would indicate these agencies of the third group are not subject to the Act's formal hearing procedures, that is, are not required by statute to confine decision to the record of the hearing. Some, however, were clearly intended to be included.⁸³ The Senate Judiciary Committee said in its report, by-passing the "record" clause: "The general limitation of this section to cases in which other statutes require the agency to act upon or after a hearing is important."⁸⁴ The House Committee reported similarly,⁸⁵ and added, "A statute may, in terms, require a rule or order to be made upon the record of a hearing, or in the usual case be interpreted as manifesting a Congressional intention so to require, and in either situation sections 7 and 8 [requiring formal procedure] would apply. . . ."⁸⁶

78. Interstate Commerce Commission (rate making), 34 STAT. 589 (1906), 49 U. S. C. § 15(1)(1940).

79. Post Office Department (revocation of second class mailing privileges), 31 STAT. 1107 (1901), 39 U. S. C. § 232 (1940).

80. 49 STAT. 2038 (1936), 41 U. S. C. § 39 (1940): "after notice and hearing" (violations of public contracts). 46 STAT. 703 (1930), 19 U. S. C. § 1337(c) (1940): "[The Commission] shall . . . afford such hearing . . . as it may deem sufficient for a full presentation of the facts" (tariff recommendations).

81. No hearing is in terms required by statute before aliens are deported. 39 STAT. 889 (1917), 8 U. S. C. § 155(a) (1940). The Supreme Court has held that a hearing must precede the deportation, saying: "This is the reasonable construction of the acts of Congress here in question. . . . In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution." *The Japanese Immigrant Case*, 189 U. S. 86, 101 (1903). *Kwock Jan Fat v. White*, 253 U. S. 454 (1920); *Chew Hoy Quong v. White*, 249 Fed. 869 (C. C. A. 9th, 1918). As to fines, see note 175 *infra* and *Lloyd Sabauda Societa v. Elting*, 287 U. S. 329, 336 (1932).

82. E.g., as to postal fraud orders, *Pike v. Walker*, 121 F.(2d) 37 (App. D. C. 1941); 50 YALE L. J. 1479, 1481.

83. Examples of statutes which state that there must be a hearing, but which clearly do not require formal procedures are found in *Sellers*, *supra* note 1, 32 A. B. A. J. at 647 n. See also testimony of Mr. Sellers at a Congressional hearing to the effect that many statutory hearings could not have been intended to be formal. *Hearings*, *supra* note 69, at 78-9.

84. At 16, referring to adjudication.

85. "This section is limited to cases in which other statutes require an agency to act upon or after a hearing. . . ." House Report at 26. Rep. Walter: "The requirements of section 5 are thus limited to cases in which statutes otherwise require a hearing. . . ." 92 Cong. Rec., May 24, 1946, at 5756.

86. House Report at 51. The statement was made as a footnote to a House change in

As final arbiters of the intent of Congress, the courts have interpreted a number of statutes in terms requiring only a "hearing" to call for decision upon the hearing record. The case of *Crowell v. Benson*⁸⁷ left no doubt as to the Longshoremen's and Harbor Workers' Compensation Act.⁸⁸ The Supreme Court has squarely so held as to rate making by the ICC⁸⁹ and as to deportation proceedings by the Immigration and Naturalization Service.⁹⁰ The courts labeled these situations as "judicial" in character. Some agencies themselves have by inference interpreted governing statutes to require determinations on a hearing record.⁹¹

On the other side, requiring no record decision and labeling the agency action "legislative," is the interpretation accorded to the Tariff Act of 1930 in *Norwegian Nitrogen Products Co. v. United States*,⁹² where the Supreme Court held that Congress had not intended to require determinations solely upon a hearing record. In this case the stress laid by the Court on the "legislative" label suggests that a different result would have called for a different label.⁹³

It appears that where courts have considered the adequacy of agency

Section 4(b), substituting "statute" for "law," and evidences that the change was made only for the purpose as stated, "to conform to the language used in the introductory clause of section 5 respecting adjudications," and envisaged no change in substance. But see Report of Attorney General: "[Section 5] is thus limited to cases in which the Congress has specifically required a certain type of hearing." Senate Report at 40. This conflicting interpretation of the Act cannot stand against so clear a statement in the House Report.

87. 285 U. S. 22 (1932).

88. 44 STAT. 1435 (1927), 33 U. S. C. § 919 (1940). The Act reads: "After such hearing is had . . . the deputy commissioner shall . . . reject the claim or make an award." The Supreme Court said, "The statute, however, contemplates a public hearing. . . . An award not supported by evidence in the record is not in accordance with law." *Crowell v. Benson*, 285 U. S. 22, 48 (1932).

89. *I. C. C. v. Louisville and Nashville R. R.*, 227 U. S. 88, 91-4 (1913). The principle was reaffirmed in *The Chicago Junction Case*, 264 U. S. 258, 265 (1924), in which the Court said, "To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action." *Accord*, as to license revocation by the former Federal Radio Commission, *Saltzman v. Stromberg-Carlson Tel. Mfg. Co.*, 46 F. (2d) 612 (App. D. C. 1931).

90. See cases cited *supra* note 81.

91. Rules of Practice of the Civil Aeronautics Board, 14 C. F. R. § 97.18 (Cum. Supp. 1943), redesignated as § 97.19, 8 FED. REG. 16889 (1943): "After the hearing the examiner, on the basis of the evidence submitted, shall prepare a report and recommendation," which is final unless appeal is taken. Rules of procedure of the Post Office Department in proceedings to revoke second-class mailing privileges, 39 C. F. R. §§ 5.37bb-cc (Cum. Supp. 1943): "Upon the basis of the hearing, arguments, and briefs the hearing officer shall promptly prepare a report." Review by the Postmaster General is confined to the same. But see Rules of Practice of the Public Contracts Division of the Department of Labor, where no limit is placed on the basis of the decisions. 10 FED. REG. 8137 (1945) (designated 41 C. F. R. § 203.11).

92. 288 U. S. 294 (1933).

93. "What is done by the Tariff Commission and the President in changing the tariff rates . . . is in substance a delegation . . . of the legislative process. . . . The inference is,

procedure—using the labels “legislative” and “judicial” to signify the court result—all agency decisions labeled “judicial” have been held invalid unless made solely on the record of a hearing.⁹⁴ It is often difficult to distinguish in the cases between legislative intent and the constitutional requirement of due process as the basis for the court decisions which require procedure more formal than that set out in governing statutes,⁹⁵ but since the courts tend to attribute due process of law to the statutes, it does not matter. Action labeled “judicial” is therefore required by statute to be made on the record of an agency hearing.⁹⁶ Thus the Act gives these labels a double significance. Not only does “judicial” signify adjudication, as pointed out above;⁹⁷ it signifies that formal procedures are required.

“AGENCY”

With such understanding as is possible of the distinctions between rule making and adjudication and between formal and informal proceedings, we may next proceed to analyze the meaning of the term “agency,” which prescribes to what persons and groups the Act’s procedural requirements apply.

The definition determines, first, the lateral coverage of the Act, for the Act applies only to agencies. Government functions are carried on by many and diverse groups, such as boards, corporations, “legislative courts” like the Court of Claims, individuals like the President and Cabinet officers. If the word “agency” includes all of these, each one must comply with the procedures described above, depending on the particular type of action involved, and with the general procedural requirements described below.⁹⁸

Section 2(a) of the Act defines an agency. It is “each authority (whether or not within or subject to review by another agency) of the Government

therefore, a strong one that the kind of hearing assured by the statute . . . is a hearing of the same order as had been given by congressional committees when the legislative process was in the hands of Congress . . .” which, the Court points out, required no determination on a record. *Id.* at 305.

94. See Davis, *An Approach to Problems of Evidence in the Administrative Process* (1942) 55 HARV. L. REV. 364, 382 *et seq.* In *United States v. Abilene and Southern Ry.*, 265 U. S. 274, 286–90 (1924), the Court held that rate-making proceedings were adversary and therefore all evidence on which the Commission based its order must be in the hearing record. Similar dictum is found in *I. C. C. v. Louisville and Nashville R. R.*, 227 U. S. 88, 91 (1913), where the Supreme Court called rate making “quasi-judicial.” In *Lloyd Sabaudo Societa v. Elting*, 287 U. S. 329, 339 (1932) it was held that a party whose “rights” were being determined by an “administrative tribunal” was entitled to have testify at the hearing the doctor upon whose certificate the party was being fined.

95. In *United States v. Abilene and Southern Ry.*, 265 U. S. 274 (1924), cited *supra* note 94, neither Constitution nor statute is mentioned. In *I. C. C. v. Louisville and Nashville R. R.*, 227 U. S. 88 (1913), cited *supra* note 94, an order not based on the record was declared violative of both statute and Constitution. For a typically ambiguous case, see *Chew Hoy Quong v. White*, 249 Fed. 869 (C. C. A. 9th, 1918).

96. A similar conclusion is reached in Walkup, *supra* note 1, at 462.

97. See discussion *supra* p. 680.

98. See *infra* p. 687 *et seq.*

of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia." If "authority" be taken at its plain meaning, as Congress undoubtedly intended that it should,⁹⁹ it includes all who act for the Government, subject to the specific exceptions, be it President,¹⁰⁰ corporations,¹⁰¹ or an agricultural station.¹⁰²

The Act excludes "courts" from its definition of agency. Reviewing courts will almost assuredly interpret this to exclude the so-called "legislative courts"¹⁰³ from the operation of the Act. That the Attorney General specifically stated that these courts were within the exception to the definition of agency,¹⁰⁴ in the presence of no contrary indication,¹⁰⁵ is sufficiently conclusive of the legislative intent.

The term "agency" will produce little controversy in its lateral spread because it is so all-inclusive, but it is important when it is used in Sections 5(c) and 7(a) to exempt the "agency" from certain requirements of the Act. Section 5(c) excludes the "agency"¹⁰⁶ from the requirements of a separation of functions. Section 7(a) exempts the "agency"¹⁰⁷ from the requirements

99. Senate Report at 10: "The word 'authority' is advisedly used as meaning whatever persons are vested with powers to act. . . ." Rep. Walter: "Whoever has the authority to act with respect to the matters later defined is an agency." 92 Cong. Rec., May 24, 1946, at 5754.

100. The question came up in the hearings of the House Committee on the Judiciary and was answered by Rep. Jennings, a member of the committee, in a hedged affirmative: "Well, if it operates to forbid the President from operation as a legislative agency, I would say that it is good law." *Hearings, supra* note 17, at 77. The President, of course, can issue substantive rules. See, e.g., 49 STAT. 31 (1935), 15 U. S. C. § 715(a) (1940) (empowering the President to make rules to carry out the law prohibiting transportation of contraband oil in interstate commerce).

101. Government corporations may exercise substantive authority just as any other arm of the government. See New York *ex rel.* Rogers v. Graves, 299 U. S. 401, 408 (1937). Most government corporations can grant money or assistance, both of which are defined in the Act as one of the modes of "relief" which "agencies" employ—suggesting corporations may be agencies. Sec. 2(f). See *supra* note 99. See also, e.g., 47 STAT. 6 (1932), 15 U. S. C. § 605 (1940) (authorizing the RFC to make loans "[t]o aid in financing agriculture, commerce, and industry").

102. In the borderline cases of small government bureaus or commissions, such as the agricultural stations, the question of spread is largely academic because what little authority these borderline groups have lies in the realm of non-substantive informal rule making and informal adjudication, which are not hampered to any significant degree by the Act.

103. Court of Claims, Court of Customs, Court of Customs and Patent Appeals, Tax Court.

104. "'Courts' includes The Tax Court, Court of Customs and Patent Appeals, the Court of Claims, and similar courts. This act does not apply to their procedure. . . ." Senate Report at 38.

105. Congress has specifically used the name "court" in statutes describing them. Likewise it has not been noted that any consideration of these bodies took place at the Congressional hearings before passage of the Act.

106. "[O]r any member or members of the body comprising the agency."

107. Or "one or more members of the body which comprises the agency."

that examiners appointed under Section 11 preside at formal hearings. If a subordinate officer or board is considered an "agency," he or it may preside at formal hearings¹⁰⁸ and be exempt from the separation of functions.

Suppose an agency authorizes a subordinate board or officer to exercise authority which is final if no review is taken. The ICC may delegate to a subordinate board what authority it has.¹⁰⁹ Any agency may give final authority to its trial examiner under Section 8(a). Are the board and the examiner "agencies"? A literal reading of the definition says they are,¹¹⁰ but such an interpretation as to these two exemptions ignores the Act's purposes. Since the basic plan of the Act is to protect private rights by, among other things, requiring special examiners and the separation of functions, it appears the clauses of exemption will be interpreted narrowly. The reason for exempting the "agency" from the separation of functions and from the trial examiner requirements is to retain policy coordination between the adjudicatory and investigatory functions, impossible if the controlling board or commission cannot supervise both functions and preside at the most important cases.¹¹¹ Where reasons for exemption are not present, as, for example, when the subordinate group has little responsibility for determining policy, the courts will probably find the subordinate group not an "agency" as intended by those particular exemption clauses,¹¹² so as to protect the basic requirements of separation of functions and the appointment of independent examiners.

GENERAL REQUIREMENTS

The four types of agency action have been defined and the requirements for each discussed, including the problems created by the term "agency." The Act contains additional procedural requirements which are independent of the type of agency action involved.

Publication of Agency Organization and Procedures. A definite change in the existing law is the requirement that every agency publish a description of its organization and its mode of procedure,¹¹³ as is well evidenced by the 966-page supplement to the Federal Register for September 11, 1946, the date on which this requirement went into effect.¹¹⁴

Right to Appear. Section 6(a) grants to any interested person the right to

108. A parallel problem lies in whether any board created pursuant to a statutory provision be permitted to preside at a hearing. See *infra* p. 700 *et seq.*

109. 54 STAT. 913-4, 49 U. S. C. §§ 17(2), 17(4) (1940).

110. They have authority and the Act specifies that an "agency" may be "within or subject to review by another agency." Sec. 2(a).

111. The Attorney General's Committee was concerned with the necessity for retaining consistency of policy at the top level. See Final Report 57-60.

112. This is undoubtedly true of the trial examiner and to a lesser degree of all subordinate boards whose sole functions are to preside at hearings.

113. Sec. 3(a).

114. 11 FED. REG. No. 177, Pt. II (1946).

appear before an agency or its representative in connection with any agency function.¹¹⁵ A new requirement, it should not, however, be a burden on the agencies, for it may be disallowed where inconvenient.

Right to Counsel. Every "party" to an agency proceeding and every person compelled to appear before an agency is given the right to have counsel.¹¹⁶ In investigatory proceedings by the OPA Administrator and the Wage and Hour Administrator, counsel has on occasion been excluded, and such action has been sustained by the courts.¹¹⁷

Subpenas. Section 6(c) of the Act specifies that subpoenas be issued to any "party" upon request and upon a "showing of general relevance and reasonable scope."¹¹⁸ The language seems to call for equality of treatment of all parties and to that extent sets forth new law. Some agencies, such as the NLRB, have discriminated in favor of their own attorneys in the method of issuance of subpoenas.¹¹⁹ Such practice will necessarily be changed to the extent that it affects the ability to obtain a subpoena.

As to whether the Act creates a new requirement of showing "coverage" prior to issuance of a subpoena there is some doubt.¹²⁰ The legislative history shows a sharp conflict not settled by the Senate and House Reports.¹²¹ In view of the favorable attitude which the Supreme Court has exhibited to the exercise of broad investigatory powers by agencies,¹²² despite the conflicting legislative history it is probable that the Court will rule that the requirement of Section 6(c) as to general relevance and reasonable scope simply codifies existing law.

Notification of Denials. Section 6(d) provides that agencies must give

115. Sec. 6(a) reads in part: "So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function."

116. Sec. 6(a).

117. *Bowles v. Baer*, 142 F. (2d) 787 (C. C. A. 7th, 1944).

118. Sec. 6(c) reads: "Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law. . . ."

119. See *infra* note 166.

120. The Supreme Court has ruled that the Fourth Amendment does not require that coverage be proved before a subpoena is issued. *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501 (1943); *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186 (1946).

121. The Attorney General stated specifically that the section simply codifies existing law, citing *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501 (1943). 92 Cong. Rec., May 25, 1946, at A3154. Rep. Walter, on the House floor, cited the identical case as overruled by Section 6(c). 92 Cong. Rec., May 24, 1946, at 5757. The House and Senate Reports state only that courts are to "inquire generally" into the coverage of the subpoena and be satisfied that the agency could possibly find that it has jurisdiction. Senate Report at 20; House Report at 33.

122. See *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186 (1946).

notification, with reasons, whenever a request made in connection with an agency proceeding is denied.¹²³ This section represents new law and necessitates modification of procedure in some agencies, notably the NLRB as regards refusals to issue complaints.

Termination of Licenses. Licenses may be terminated only if the licensee has been given an opportunity to correct the conduct or facts justifying such termination.¹²⁴ Excepted from the requirement is any case of "willfulness" or where "public health, interest, or safety requires otherwise," leaving so much latitude to the agency to omit the procedure that it is doubted whether the provision more than addresses itself to agency discretion.¹²⁵

JUDICIAL REVIEW

Though strong statements have been made about the Act increasing judicial review of agency action,¹²⁶ it would seem that the Act merely codifies the pre-existing law of judicial review.¹²⁷ In at least three respects however, there is some ground for asserting that the Act prescribes new standards: (1) whether Section 10(c) enlarges the availability of judicial review, (2) whether the requirement of decision in formal proceedings on "reliable, probative, and substantial evidence" changes in any way the scope of judicial review of formal proceedings, and (3) whether the requirement that courts set aside agency action "unwarranted by the facts to the extent that the facts are subject to trial *de novo*" in any way changes the scope of judicial review of informal proceedings.

In some quarters it has been believed that the Act grants some rights to judicial review which were not previously available. This belief is based on

123. Section 6(d) reads as follows: "Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds." The limitations, "interested person" and "in connection with an agency proceeding," are to be noted.

124. Section 9(b) reads in part as follows: "Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements."

125. It is to be noted, however, that the agency, under section 9(b), must take final action before allowing a "continuing" license to terminate, and that courts, under section 10(d), are authorized to maintain the status quo during judicial review, that is, extend the license. The Attorney General stated these two provisions may represent new law, which might be of some real help to licensees. Senate Report at 43, 44.

126. See McCarran, *loc. cit. supra* note 1.

127. So concluded the Attorney General. Senate Report at 43. Approximately the same views are expressed in Nathanson, *supra* note 1, at 413-8, and Walkup, *supra* note 1, at 473-6.

Section 10(c), which reads, in part, "Every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review." It is to be noted, however, that only persons suffering "legal wrong" may seek review.¹²⁸ Since a "legal wrong" can only mean something wrong in the eyes of the law and therefore subject to judicial redress,¹²⁹ this section, of itself, undoubtedly adds nothing to the law.¹³⁰ The only legislative history on this point declares flatly that it restates existing law.¹³¹

In formal proceedings the agency must decide upon "reliable, probative, and substantial evidence."¹³² Reviewing courts are directed to set the agency action aside if it is not supported by "substantial" evidence.¹³³ By the plain language of the Act as regards sufficiency of proof it would seem that though the agency is directed to decide on "reliable, probative, and substantial evidence," the courts may not set aside the agency action unless it lacks only "substantial" evidence. The trio of adjectives are in this view addressed to agency discretion. This was the conclusion of the Attorney General.¹³⁴ The language of the committee reports does not exclude this conclusion.¹³⁵ The "substantial evidence" rule has, of course, been well established by judicial decision.¹³⁶ A second view of the effect of "reliable, probative, and substantial" is that it is precisely what the courts have required of agencies in court decisions applying the "substantial evidence" rule.¹³⁷ This is the unequivocal interpretation accorded to the trio of adjectives by the Senate Committee in the explanations of its second committee print.¹³⁸ The House Report is not clear,¹³⁹ while the Senate Report and Representative Walter declare that agencies must follow the rules of

128. Unless statutes specify otherwise. Section 10(a) reads: "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

129. See, for a sidelight, a double-talking discussion on this subject in the Senate, 92 Cong. Rec., March 12, 1946, at 2194.

130. Judicial review of Immigration Service deportation and exclusion orders lies only by writ of habeas corpus, traditionally a discretionary writ. It is possible that the Act makes issuance of the writ mandatory, but such a result is unlikely. The Reports indicate that the common law forms of judicial review are not to be changed but merely to be made available if no other is available. Senate Report at 26; House Report at 42.

131. Senate Committee Print at 19. *Report of Attorney General*, Senate Report at 44.

132. Section 7(c) reads in part: ". . . no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative and substantial evidence."

133. Sec. 10(e)(5).

134. Senate Report at 42.

135. Senate Report at 28; House Report at 45.

136. See, for one of the best statements of the rule, *Consolidated Edison Co. v. NLRB*, 305 U. S. 197, 229-30 (1938).

137. *Ibid.*

138. Senate Committee Print at 14.

139. House Report at 36.

decision of courts of law and equity.¹⁴⁰ In view of the confused legislative history it is probable the courts will favor the interpretations of the Attorney General and the Senate Committee Print that the phrases merely restate well-established law, since such a determination would accord with current attitudes of judicial self-denial in reviewing the findings of administrative agencies.

The third problem of interpretation appears from Section 10(e)(6) of the Act, directing courts to set aside agency action if "unwarranted by the facts to the extent that the facts are subject to trial *de novo*." The term "trial *de novo*" as usually employed by courts means a situation where the courts try over again the entire matter and decide it as though the agency had never made a decision.¹⁴¹ Such a review could hardly be amplified by the phrase "unwarranted by the facts." As thus interpreted, the subsection adds nothing to already existing law.

There is some indication in the legislative history and subsequent comment, however, that the term trial *de novo* meant more than courts have usually imported to the term, that it included all instances of judicial review where a party could bring in evidence other than the record of an agency hearing—that is, all reviews of informal proceedings.¹⁴² This less likely meaning of the term still would probably add nothing to existing law. None of Section 10 applies where the agency action is committed to agency discretion. Since decision as to the factual merits of a particular situation before an agency lies generally in agency discretion when the agency is not required to precede its decision by notice and full hearing, it follows that the factual merits of an agency decision made after an informal proceeding are not generally subject to Section 10 at all.¹⁴³ Even with the broader meaning of trial *de novo* the clause can add little to the scope of judicial review. If there are cases of informal proceedings where the factual merits are not a matter of discretion, it is still doubtful whether "unwarranted" would be given any stronger meaning than pre-existing standards of review of informal proceedings.¹⁴⁴

TRIAL EXAMINERS

One of the most fundamental changes brought about by the Act is the raising and setting apart of the position of the trial examiner in formal

140. Senate Report at 22; 92 Cong. Rec., May 24, 1946, at 5758.

141. *Kessler v. Strecker*, 307 U. S. 22, 34-5 (1939). Cases cited in 42 WORDS AND PHRASES (Perm. Ed. 1940) 524-7. Trial *de novo* is apparently used in this sense in § 5. It is doubtful whether the legislators intended a different meaning of the word in § 10(e)(6).

142. Senate Report at 28. House Report at 45-6. Rep. Walter: "Where there is no statutory administrative hearing to which review is confined, the facts pertinent to any relevant question of law must of course be tried and determined *de novo* by the reviewing court," quoted and endorsed in *Sellers*, *supra* note 1, 32 A. B. A. J. at 648.

143. See *supra* p. 685.

144. See *Pacific States Box & Basket Co. v. White*, 296 U. S. 176 (1935).

proceedings. In other than certain technical proceedings he is subjected to a complete separation of functions. He is guaranteed full procedural powers to conduct hearings. And by Section 11 he is set apart from the agency as to appointment, promotion, and removal—placed for these matters under the jurisdiction of the Civil Service Commission.

Section 11 was the result of extensive discussion of the various means of securing independent trial examiners.¹⁴⁵ It provides that examiners shall be appointed by the agency according to the civil-service statutes and regulations, be assigned to cases in rotation, be paid salaries prescribed by the Civil Service Commission independently of agency recommendations, and be removable only by the Civil Service Commission after opportunity for hearing.¹⁴⁶

The Civil Service Commission, if it applies the procedures customary in the appointment of federal employees, will prescribe standards of education and experience to be met by applicants, and will conduct examinations and interviews of those who meet the prerequisites. The Commission will probably work with the agencies in formulating the qualifications to be required. The agency will then make its appointment from the eligibles certified to it by the Commission. Previous experience suggests that many of the appointees will actually be selected by the agency, and appointed after Commission approval is obtained. The effect of the new appointment procedure will depend on the extent to which the Commission relies on agency selections and advice, but it seems likely that the agency will usually be able to appoint competent men of its own choice.¹⁴⁷

The promotion of an examiner to a higher grade or classification might be considered either an appointment or the prescription of compensation, effected by the Commission independently of agency recommendations or ratings.¹⁴⁸ The legislative history makes it clear that the latter was intended by Congress.¹⁴⁹ Formally, therefore, full responsibility for the promotion of trial examiners is thrust on the Commission. The Act suspends for trial

145. See Senate Committee Print at 21.

146. Section 11: "Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as trial examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission . . . after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations. . . ."

147. The Act is silent on the status of examiners now employed; presumably the Commission will not require a large-scale replacement of present examiners.

148. "The general rule is that in some instances promotion is considered as an appointment, but that in other instances . . . it is not so considered." FIELD, CIVIL SERVICE LAW (1939) 127.

149. The Senate and House Committees reported in identical language: "The Commission would exercise its powers by classifying examiners' positions and, upon customary

examiners the efficiency rating system by which promotions of other civil service employees are governed in part by supervisors' ratings. This is a significant formal change in promotion practices, but the rating system's importance in other agencies has been weakened because supervisors hesitate to give low ratings which might endanger an employee's tenure or hurt his feelings and self-assurance. The importance of the suspension of efficiency ratings may be further minimized because the House and Senate Reports make it plain that the Commission will be able to rely on the advice of the agency,¹⁵⁰ so that the Commission, unless it adopts a strict seniority rule, will necessarily listen to agency recommendations. The agency itself, watching the work of the trial examiners from day to day, is the only group capable of judging whether there is a reasonable relation between the compensation of its examiners and the ability and diligence which they apply to their tasks. The alternative of promotion by seniority alone does not appear to be desirable, or to fulfill Congressional intent. It is more plausible to assume that in general promotions will be made in accordance with agency recommendations.

Section 11 provides that examiners may be removed only after a formal hearing by the Commission.¹⁵¹ The protection thereby granted is greater than that afforded other civil service employees.¹⁵² Actual use of the removal procedure is likely to be limited; in the past agencies such as the NLRB have rarely found it necessary to remove examiners. Yet the loss of the power to remove may deprive the agency of a valuable stim-

examination through its agents, shift examiners to superior classifications or higher grades as their experience and duties may require." Senate Report at 29; House Report at 46-7.

150. "Agencies may make, and the Commission may consider, recommendations; and the Commission might consult the agency, as it now does in setting up positions or re-classifying positions, but it would act upon its own responsibility and with the objects of the bill in mind." House Report at 47. A similar view is taken in the Senate Report at 29.

151. *Supra* note 146. "[The Commission] must afford any examiner an opportunity for a hearing before acceding to an agency request for removal, and even then its action would be subject to judicial review." House Report at 46; Senate Report at 29.

152. Civil service employees are only entitled to notice, with reasons, and an opportunity to submit an answering statement. 37 STAT. 555 (1912), 5 U. S. C. § 652 (1940). The Civil Service Commission has no jurisdiction to review the findings of a removal officer unless it is alleged that the removal was made for political or religious reasons, or that the statutory procedure was not followed. Civil Service Commission Rule XII, 5 C. F. R. § 12.4 (Cum. Supp. 1943). The Fiftieth Annual Report of the Commission contained official objections to this restriction on its authority: "The Commission is constantly receiving complaints of improper treatment in efficiency ratings, of unjust removals, suspensions, and other adverse actions, but it is without power to take remedial measures except in cases of dismissal, and then only when it is alleged, with offer of proof, that the procedure required by the civil-service rules has not been followed or that the dismissal was made for political or religious reasons." *Fiftieth Annual Report of the United States Civil Service Commission*, H. R. Doc. No. 138, 73d Cong., 2d Sess. (1933) 11. There is no judicial review of the cause of the dismissal, but an employee is entitled to a review of the dismissal procedure. *Eberlein v. United States*, 257 U. S. 82 (1921); *United States v. Wickersham*, 201 U. S. 390 (1906).

ulus to the work of the examiners. The Act makes it virtually impossible for the agency to remove an examiner. An agency is unlikely to try to remove one except under the most intolerable circumstances. Proof of good cause will be a slow and exacting task. The incompetence for which the agency will desire removal will generally consist of intangibles such as writing inadequate opinions, lack of alertness at hearings, and other shortcomings, which can be shown to Commissioners and courts, if at all, only by painstaking analysis of volumes of evidence and by comparison with the work of other trial examiners. At times, the agency may find that an examiner does not believe in the policies of the governing statute as interpreted by the agency, and removal again will be obstructed by the difficulties of proving the unmeasurable. Whatever the agency is able to do,¹⁵³ the removal restrictions are likely to be one of the most painful parts of the Act, and should add little to the protection afforded parties to agency hearings.¹⁵⁴

By implication the Attorney General's Committee raised the question of whether the Civil Service Commission is the appropriate agency to prescribe standards for the appointment of trial examiners. The work of the Commission in recruiting professional personnel has often been criticized as attempting to measure quantitatively unmeasurable qualities, and as being ill-adapted for the hiring of specialized civil servants.¹⁵⁵ The Attorney General's Committee recommended that a special Office of Federal Administrative Procedure have jurisdiction to review appointments and removals of examiners.¹⁵⁶

153. Examiners must be assigned to cases in rotation so far as practicable, but an agency would no doubt manage to avoid placing incompetent examiners on major cases, and the carrying out of the requirements of the Act in this respect appears to be committed at least to a degree to agency discretion.

154. The theory behind Section 11 is apparently that impartiality is best attained by insuring complete independence of the examiners. Although impartial determination of private rights requires that trial examiners be completely free from control by prosecuting officials of an agency, it does not follow that they should be uncontrolled by members of the agency. The duty of the examiners is not to act as they see fit, but to carry out the policies of governing statutes as interpreted by the courts and the agency. Since the reputation of agencies like the NLRB depends very largely on the competence and fairness of their trial examiners, their incentive to maintain an able corps of examiners would usually seem to be sufficient. On the other hand, it is probable, as the Attorney General's Committee pointed out (Final Report at 47), that public confidence would be inspired and charges of the appointment of over-zealous examiners would be rebutted by the investigation and approval of the qualifications and capacity of the examiners before their appointment.

155. Particularly searching was the study made for the President's Committee on Administrative Management, REEVES AND DAVID, *PERSONNEL ADMINISTRATION IN THE FEDERAL SERVICE* (1937), esp. 22-4. For a discussion of experience with Civil Service Commission classification of trial examiners in agencies other than the Labor Board, see LANDIS, *THE ADMINISTRATIVE PROCESS* (1938) 104-5. The Commission and the administrative agencies have had particular difficulties with positions which are peculiar to one agency. MERIAM, *PUBLIC PERSONNEL PROBLEMS* (1938) 72-3.

156. Final Report at 47. The Office was to have the functions of investigating agency

Section 11, it appears, will have substantial direct effect only in hindering the removal of trial examiners. The combination, however, of Section 11 placing beyond the agency's immediate control appointment, promotion, and removal of trial examiners, of Section 8(b) guaranteeing the trial examiner the powers necessary to conduct a hearing, and of Section 5(c) providing for the separation of functions will undoubtedly make the trial examiner a more independent and responsible person, and will probably make headway towards perhaps the most important objective in formal hearings—attracting better men to the position of trial examiner.

NATIONAL LABOR RELATIONS BOARD

A horizontal analysis of the Act as it affects all agencies shows the limited nature of the actual change that has been made in Federal administrative law. A vertical analysis of two agencies, the National Labor Relations Board and the Immigration and Naturalization Service, will show the Act's even more limited effect on actual agency practice.

The procedure of the National Labor Relations Board illustrates the elaborate mechanism of formal adjudication. Compared to the Immigration Service, the Board proceedings are few, and less than one-quarter of the Board's cases reach the hearing stage; but in a few hundred unfair labor practice cases each year the full ritual of adjudication is performed. These proceedings serve as a model for outlining the impact of the Act on formal adjudication.

Of the two types of procedures recognized by the Act, only adjudication is important for the Board. The Board is authorized by the National Labor Relations Act to make "such rules and regulations as may be necessary to carry out the provisions of this Act,"¹⁵⁷ but in interpreting the substantive provisions of the Wagner Act it has proceeded case by case exclusively, building up a body of precedents to be followed in making decisions. Its procedural rules are published as they are issued or amended.¹⁵⁸

practices and making recommendations to facilitate adoption of procedures which proved satisfactory, in addition to reviewing the appointment and removal of trial examiners. *Id.* at 193-8. An agency with the responsibility for assisting the agencies to do their jobs effectively as well as protecting the rights of the trial examiners would be more likely to study the special nature of the trial examiners' job and adopt its procedures accordingly, unhindered by precedent built up in recruiting less specialized personnel. And for a while, at least, new agencies seem to approach their jobs with a zeal unachieved by settled organizations.

157. 49 STAT. 452 (1935), 29 U. S. C. § 156 (1940). This provision has been thought by many only to authorize procedural rule making. Final Report at 98 n. 18.

158. "Rules of agency organization, procedure, and practice" are exempt from the notice and hearing before issuance requirements of section 4 of the Act. Certain Board rules, particularly those governing the handling of run-off elections in certification proceedings might be called "substantive" rather than "procedural." An example is 29 C. F. R. § 203.56(c): "The ballot in the run-off election shall provide for a selection between the two choices that receive the largest and the second largest number of valid votes cast in the

The Board's main functions are (1) the certification of collective bargaining agents and (2) the prevention of unfair labor practices by the issuance of cease-and-desist orders after a hearing to determine whether there have been such practices. Certification, the most important in number of cases handled,¹⁵⁹ is exempt from the Act's formal-hearing requirements.¹⁶⁰ No necessary changes in present procedure have been noted.¹⁶¹ Unfair labor practice proceedings, subject to all the provisions of the Act affecting formal adjudication,¹⁶² already incorporate the main practices required by the Act.

Changes in Board procedure are made by the Act in only three respects, two of which are minor and will afford little increased protection to those taking part in Board proceedings.¹⁶³ In order to comply with the Act the Board must accompany each refusal to issue a complaint with a short statement of the reasons for the refusal.¹⁶⁴ Section 6(c), which requires agency subpoenas to be issued upon request and a showing of general relevance and reasonable scope, may force the Board to discontinue its discrimination in favor of its own prosecutors in the mode of issuance of subpoenas.¹⁶⁵ The Attorney General's Committee and the courts have criticized the Board practice of issuing subpoenas in blank to its own staff while requiring a show-

election, except as provided in this paragraph or otherwise directed by the Board." Rules and Regulations, Series 4, 11 FED. REG. 177A-613 (1946).

The Board's organization must now be published also. Sec. 3(a).

159. Through June 30, 1945, 39,925 representation cases and 37,306 unfair labor practice cases were filed with the Board. Representation cases have steadily increased in number, totalling 7,310 in the fiscal year ending June 30, 1945, while the number of unfair labor practice cases has decreased since 1942, only 2,427 being filed in the 1945 fiscal year. Ninety per cent of the unfair labor practice cases and 73 per cent of the representation cases have been closed before formal action by the Board. 10 NLRB ANN. REP. (1945) 6, 12.

160. Sec. 5. The exemption was not included in the original bill, but was added by the Senate Judiciary Committee because the "determinations rest so largely upon an election or the availability of an election." Senate Report at 16. The non-prosecutory nature of certification proceedings, the need for expeditious handling, and the fact that questions of credibility are not usually involved render inapt the formality attending the unfair labor practice proceeding and the use of specially trained impartial trial examiners.

161. The question as to whether a disappointed union may obtain judicial review has not been decided in court. Since the question is one of legal standing, it is unlikely that the Act settles the question. See *supra* pp. 689-90.

162. The definitions of "rule" and "order" in the Administrative Act are so vague that they are not much help in classifying the Board's action. It is safe to predict, however, from the discussion *supra* p. 679 *et seq.*, that an unfair labor practice proceeding would be labeled "judicial" and found to be formal adjudication.

163. See Findling, *supra* note 1, for a more detailed analysis of the effect of the Act on NLRB procedure.

164. Sec. 6(d). The Board adopted this change in the rules published September 11, 1946: "If, after the charge has been filed, the Regional Director declines to issue a complaint, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds. . . ." Rules and Regulations, Series 4, 29 C. F. R. § 203.15, 11 FED. REG. 177A-607 (1946). Provision for a similar statement to accompany the denial of an application for a subpoena was made in § 203.27, 11 FED. REG. at 177A-608.

165. See *supra* p. 688.

ing of relevance from other parties.¹⁶⁵ The most drastic change will be in the mode of appointment, promotion and removal of trial examiners, which Section 11 places under the supervision of the Civil Service Commission.¹⁶⁷

One further matter may be thought to require change—the rules of evidence. While the National Labor Relations Act provides that “the rules of evidence prevailing in courts of law or equity shall not be controlling,”¹⁶³ those rules are generally followed; the chief exception is that hearsay evidence is often admitted.¹⁶⁹ The Administrative Procedure Act demands no more.¹⁷⁰

THE IMMIGRATION AND NATURALIZATION SERVICE

Introduction. Probably more than any other government agency the Immigration and Naturalization Service sets in bold relief the most difficult problems of interpreting the Administrative Procedure Act.

The Service is a cabinet agency performing largely adjudicatory functions.¹⁷¹ As is typical of such agencies, in contrast with the so-called independent agencies like the NLRB, the Service operates under a variety of statutes, many of which date back to the 1880's and early 1900's.¹⁷² When

166. MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, SEN. DOC. NO. 10, 77th Cong., 1st Sess. (1941) Pt. 5, at 19. *Inland Steel Co. v. NLRB*, 109 F. (2d) 9 (C. C. A. 7th, 1940).

167. See *supra* p. 691 *et seq.*

168. 49 STAT. 454 (1935), 29 U. S. C. § 160b (1940).

169. MONOGRAPH, *op. cit. supra* note 166, at 19.

170. House Report at 36. Senate Report at 22. See also discussion *supra* p. 690. As to evidence and the correlative problem of official notice, see Nathanson, *supra* note 1, at 401-6.

171. Although the Service is endowed with broad rule-making authority, it issues few substantive rules. Those which it issues are primarily interpretative or descriptive of the Service organization and procedure and are not specifically required by statute to be determined on a record. 39 STAT. 892 (1917), 8 U. S. C. § 102 (1940); 43 STAT. 166 (1924), 8 U. S. C. § 222 (1940); 54 STAT. 675 (1940), 8 U. S. C. § 458 (1940). However, although this type of rule-making authority is not subject to the hearing requirements of the Act, the few substantive rules issued by the Service are subject to Section 4(a) relating to notice. In accordance with this section, the Service, on September 11, 1946, promulgated a regulation providing that all substantive rules will be issued after notice, and all interested parties will be given an opportunity to participate in such rule making under such conditions as may be specified in the notice of the proposed rule making.

172. The first important functions of the Service actually date back to the Act of August 3, 1882, which authorized the Secretary of the Treasury to administer the immigration and naturalization laws of the United States. 22 STAT. 214 (1882). By the Act of March 3, 1891, the Office of Superintendent of Immigration was established to assist the Secretary of the Treasury in this duty. 26 STAT. 1085 (1891). By the Act of June 29, 1906, the duty of administering the immigration and naturalization laws was transferred to the Department of Commerce and Labor and was lodged in the Bureau of Immigration and Naturalization established for this purpose. 34 STAT. 596 (1906). With the separation of the Department of Labor and Commerce into two departments in 1913, the Bureau was transferred to the Department of Labor and was split into two Bureaus, one for the administration of the immigration laws and one for the administration of the naturalization laws. 37 STAT. 737

these statutes were enacted, Congress was primarily concerned with the substantive controls which should be imposed on aliens, and as a result the procedures (if any) laid down in these statutes for the discharge of the adjudicatory work of the Service contain few of the safeguards for the protection of individual rights which are found in the more recent statutes creating federal agencies. The procedural safeguards which are accorded to aliens today are largely the result of judicial construction of the statutes and administrative policies.

It is on the level of the Service's regional offices that the great bulk of the initial adjudicatory work is carried on. This work falls generally into three broad categories: admission of aliens, deportation of aliens unlawfully residing in the country, and preliminary investigation and consideration of all applications relating to naturalization.

In regard to the admission of aliens, or the exclusion process as it is called, the chief responsibility of the Service is to determine the admissibility qualifications of all aliens who attempt to enter this country.¹⁷³ The Attorney General is given discretionary authority to make exceptions in certain cases.¹⁷⁴ The Service also administers the levying of fines on carriers which violate the immigration statutes in the transportation of aliens to this country.¹⁷⁵

Of these various duties, only the Service decision in regard to the exclusion of aliens who are found to be inadmissible under the immigration laws is expressly required by statute to be determined after a hearing.¹⁷⁶ In practice the Service also conducts hearings in fines proceedings. This practice is not followed as a result of an express statutory command, but as a

(1913). In 1933, the two bureaus were reunited into the Immigration and Naturalization Service [Ex. Order No. 6166, § 14, June 10, 1933, set out at 5 U. S. C. §§ 124-132 n. (1940)], and in 1939 the Service was transferred to the Department of Justice under which it operates today. 5 FED. REG. 2223, 54 STAT. 1238 (1940).

173. 39 STAT. 875-8 (1917), 8 U. S. C. § 136 (1940).

174. 39 STAT. 877 (1917), 8 U. S. C. § 136(h) (1940); 43 STAT. 162 (1924), 8 U. S. C. § 213(d) (1940); 43 STAT. 157-9 (1924), 8 U. S. C. §§ 209-10 (1940).

175. There are five separate provisions in the immigration statutes which authorize the imposition of administrative fines on transportation companies who bring aliens to this country in violation of the immigration laws: 39 STAT. 879 (1917), 8 U. S. C. § 143 (1940) (for bringing to United States an alien who was unlawfully solicited by the company to emigrate); 39 STAT. 880 (1917), 8 U. S. C. § 145 (1940) (for bringing to the United States an alien subject to a physical or mental defect or afflicted with a loathsome disease); 39 STAT. 884 (1917), 8 U. S. C. § 150 (1940) (for failure or refusal to furnish a list of alien passengers on board); 43 STAT. 164 (1924), 8 U. S. C. § 167 (1940) (for failure to detain alien seamen for inspection by immigration authorities, or after inspection if so required by the latter); and 43 STAT. 163 (1924), 8 U. S. C. § 216 (1940) (for bringing to the United States an alien who has an improper visa). These provisions will hereafter be referred to by the United States Code citation alone.

176. The statute provides that aliens about whose admissibility there is any doubt shall be brought before a board of special inquiry for a hearing. 39 STAT. 886-7 (1917), 8 U. S. C. §§ 152-3 (1940).

result of administrative policy and judicial construction of some of the statutory provisions under which fines are imposed.¹⁷⁷

As to aliens who are resident within the country, the service is responsible for ensuring that no alien has entered illegally and that those who entered legally are complying with the statutory provisions relating to their conduct while residing here. Those found unlawfully in the country are taken into custody and deported.¹⁷⁸ Although the statutes are silent as to the procedure for such deportation, as a result of judicial interpretation of these statutes, the Service is obliged to accord such aliens a formal hearing before they can be legally deported.¹⁷⁹

Although the Service is responsible for the administration of the Nationality laws of the United States, the major adjudicatory work attached to such administration is performed by the courts.¹⁸⁰

Classification of Service Functions. The principal problem of applying the Act to the work of the Immigration and Naturalization Service is the classification of its various tasks as rule making or adjudication and as involving formal or informal proceedings. Proceedings conducted by the Service to determine the admissibility of aliens, their liability for deportation, and the liability of carriers for violations of the immigration statutes are probably all formal adjudications within the meaning of the Act.

Deportation, according to the strict terms of the statutes, need not be preceded by any hearing at all. By direct court holding, however, a hearing has been required with decision confined to the hearing record, the label "judicial" being attached.¹⁸¹ With that label it is formal adjudication.¹⁸²

The situation, however, is less clear with respect to the nature of the administrative fine proceeding. Here again the statutes are silent as respects the necessity for a hearing, and the Service has granted hearings.¹⁸³ The case of *Lloyd Sabaudo Societa v. Elting*¹⁸⁴ held fairness demanded that decision be confined to the record of a hearing. This places the administration of fines in the class of "judicial" proceedings and therefore of formal adjudication.¹⁸⁵

177. See, e.g., *Lloyd Sabaudo Societa v. Elting*, 287 U. S. 329, 336 (1932).

178. See 39 STAT. 889 (1917), 8 U. S. C. § 155(a) (1940).

179. See *supra* note 81.

180. 54 STAT. 1156, 8 U. S. C. §§ 733-4 (1940). Here the agency is subject only to the mild requirements of informal adjudication, for it is exempted by Section 5 from formal procedures because it is acting as the agent for a court.

181. Cases cited *supra* note 81. The Japanese Immigrant case, 189 U. S. 86 (1903); *Ex parte Hidekuni Iwota*, 219 Fed. 610 (S. D. Cal. 1915), *aff'd without opinion*, 244 U. S. 643 (1917); *Mahler v. Eby*, 264 U. S. 32 (1924); and *Bridges v. Wixon*, 144 F. (2d) 927 (C. C. A. 9th, 1944), *rev'd on other grounds*, 326 U. S. 135 (1945).

182. See *supra* p. 670 *et seq.*

183. The carrier, however, has no opportunity to cross-examine or submit rebuttal evidence. 8 C. F. R. §§ 23.13-.17 (1938), redesignated 8 C. F. R. §§ 160.13-.17 (Cum. Supp. 1943).

184. 287 U. S. 329 (1932).

185. Nor are the proceedings exempted from the formal requirements by being subject

In cases of exclusion there is no question about the proceeding being formal, for the statute calls in terms for decision on the hearing record.¹⁸⁶ That exclusion proceedings constitute adjudication rather than rule making appears to be clear because of their application to named individuals and their similarity to "judicial" proceedings.

The remainder and greater portion of the orders issued by the Service, and the Attorney General on appeal, are discretionary, and undoubtedly need not be preceded by notice and a full hearing.¹⁸⁷ With the resulting "legislative" label they are informal proceedings. The additional factor of particular applicability makes their formulation informal adjudication.

Effect on Exclusion Proceedings. Under the present practices of the Service, all aliens are subjected to a preliminary examination as to their admissibility immediately upon arrival in this country. If any doubt arises as to their right to enter, they are detained for a hearing before a board of special inquiry which is expressly provided for by statute for this purpose.¹⁸⁸ These boards are composed of three members selected by the District Director from among immigration inspectors who have been designated by the Attorney General as qualified to serve thereon.¹⁸⁹ The hearings before these boards are private, and the alien is not permitted to retain counsel.¹⁹⁰ The decisions of the board are final unless reversed on appeal to the Attorney General.¹⁹¹

The Service will be required to permit an alien to retain counsel at the hearing before the board¹⁹² and, in addition, will have to clarify its practices with respect to the giving of notice to the alien of the agency hearing and the reasons therefor.¹⁹³

The chief problem, however, with respect to the application of the Act to the hearings before the boards of special inquiry arises in regard to the

to trial *de novo*. The facts as found by the Secretary of Labor may not be redetermined in court. *Lloyd Sabaudo Societa v. Elting*, 287 U. S. 329, 338 (1932).

186. 39 STAT. 887 (1917), 8 U. S. C. § 153 (1940).

187. *E.g.*, *Nagle v. Naoichi Misho*, 33 F. (2d) 470 (C. C. A. 9th, 1929); *Stone ex rel. Colonna v. Tillinghast*, 32 F. (2d) 447 (C. C. A. 1st, 1929). See *supra* p. 684. *Cf.* *Linklater v. Perkins*, 74 F. (2d) 473, 476 (App. D. C. 1934).

Some of the many discretionary orders are: orders which the Attorney General is authorized to issue admitting an alien who is otherwise inadmissible (*supra* note 174); rulings on petitions and applications submitted by aliens for an extension of their stay or for permission to depart and return (*supra* note 174); remission of fines on carriers [39 STAT. 896 (1917), 8 U. S. C. § 169 (1940)].

188. 39 STAT. 887 (1917), 8 U. S. C. § 153 (1940).

189. 8 C. F. R. § 12.1 (1938), redesignated 8 C. F. R. § 130.1 (Cum. Supp. 1943).

190. 8 C. F. R. § 12.2 (1938), redesignated 8 C. F. R. § 130.2 (Cum. Supp. 1943).

191. 39 STAT. 887 (1917), 8 U. S. C. § 153 (1940). For mode of judicial review see *supra* note 130.

192. See *supra* p. 688.

193. There is no provision in the Service regulations for giving the alien notice of the reasons for his detention prior to his hearing before the board of special inquiry. In actual practice, however, the alien is generally informed in an informal manner of the questions in

provisions of Sections 5(c) and 7(a) relating to the presiding officers and the separation of functions. Section 7(a) exempts from the requirement of special trial examiners (1) all hearings conducted by the "agency" and (2) "specified classes of proceeding" conducted by boards "specially provided for by or designated pursuant to statute." Unless the boards of special inquiry are included in one of the two exemptions, the Immigration Service will be required to have the hearings conducted instead by single trial examiners. The criterion laid down under the discussion of the meaning of "agency" suggests that a board of special inquiry does not have sufficient policy responsibilities to justify its classification as an agency.¹⁹⁴

There is considerable support, however, for considering these boards as special statutory boards and therefore exempt from the operation of the trial examiner system as required in Section 7(a). The exemption of such boards was inserted in order to preserve special statutory types of hearing officers who contribute something more than examiners could contribute. The committee reports indicate that the exemption should be strictly construed, and in particular that statutory provisions authorizing the use of employees or attorneys generally should not be considered authorization for exemption. However, some statutory boards listed by the Attorney General in the Senate Report as examples of the exempted class seem to fall within the group which the reports indicate is not exempted.¹⁹⁵ The apparent conflict can only be resolved on the grounds that the statutes setting up these boards did not authorize the use of employees generally but rather specified that their members should be selected from among eligible employees designated as such by the agency head. Using this distinction as a criterion, it would seem that the boards of special inquiry must be treated as within the exempted category in view of their similarity to the boards specifically mentioned as exempt.

Even though the boards of special inquiry may be employed to preside in lieu of independent trial examiners, they will nevertheless have to be reorganized to comply with the provisions of Section 5(c), requiring separation

regard to his admissibility which gave rise to his detention. Section 5(a) clearly contemplates a more formalized procedure with respect to such notice than hitherto employed by the Service and it seems obvious that the latter will have to alter its practice in this respect. Until some evidence is brought out which would indicate that the alien was probably not admissible, it would be impossible for the Service to comply with the more formalized notice requirements as envisaged in section 5(a). It is possible that when such grounds do appear the Service could then be required to serve notice on the alien of "the matters of fact and law asserted" against him and the alien could be accorded an opportunity to request a continuance to enable him to prepare his defense.

194. See discussion at p. 687 *supra*.

195. The examples included the Marine Casualty Investigation Board, Board of Employees authorized under the ICC, and boards set up to review the rights of disconnected service men. Senate Report at 41-2. The boards mentioned are composed of specially qualified personnel to be appointed by the agency head. 49 STAT. 1381 (1936), 46 U. S. C. § 239 (a) (1940); 58 STAT. 287 (1944), 38 U. S. C. § 693i (Supp. 1946); 54 STAT. 913-4, 49 U. S. C. § 17(2) (1940).

of functions. These boards are not necessarily permanent bodies but are established whenever the need for them arises. In smaller immigration stations, where the volume of exclusion proceedings is relatively small, the members of the special boards have frequently engaged in both investigatory and adjudicatory activities. Under Section 5(c) it would seem that the Service must now confine the members of these boards solely to the duty of hearing cases.

Effect on Deportation Proceedings. Under existing practices of the Service in regard to the deportation of aliens,¹⁹⁶ the Attorney General must first issue a warrant of arrest for the alien against whom it is intended to bring deportation proceedings. A copy of this warrant together with a statement of the grounds on which it was based is then served on the alien. At the same time he is informed of his right to retain counsel and of the date of the hearing, which must be set at a reasonable time to enable him to prepare his defense. The hearing is conducted before two immigration inspectors, neither one of whom may be the inspector who originally investigated the case unless the alien consents to his participation. In actual practice, the inspector who originally investigated the case almost never participates in the hearing regardless of whether the alien consents thereto or not.

The only change in this procedure which is necessitated by the Act will be in reference to the personnel in charge of the hearing.¹⁹⁷ Under Section 7(a) the agency will be required to assign examiners appointed in accordance with Section 11 to conduct the hearings.

Effect on Fines Proceedings. Though classified under the Act as formal adjudication, fines proceedings have been of a summary nature. The carrier is informed of the charge that it has violated one of the immigration laws and is given 60 days to submit evidence as to why a fine should not be imposed.¹⁹⁸ The carrier may appeal to and make oral argument before the Board of Immigration Appeals.¹⁹⁹ The Act requires substantial changes in this procedure. There must be a formal hearing, with independent trial examiners, the separation of functions, and an intermediate decision²⁰⁰—all new procedures.

Effect on Discretionary Proceedings. The discretionary orders of the Service, all of which fall in the category of informal adjudication, will be subject to only two minor new requirements. When any petition for an order is

196. See 8 C. F. R. Pt. 150 (Cum. Supp. 1943) as amended by 8 C. F. R. Pt. 150 (Supp., 1943, 1944).

197. The procedure for making an intermediate decision, as outlined in Section 8(a), is already followed. The officer who presided at the hearing is required to submit a memorandum containing his summarization of the evidence, his conclusions of fact and of law, and his proposed order. The alien is permitted to inspect the record and the attached memorandum and to file exceptions thereto together with briefs if he so desires. 8 C. F. R. §§ 90.3-12, 150.7 (Cum. Supp. 1943).

198. See *supra* note 183.

199. 8 C. F. R. § 90.7 (Cum. Supp. 1943).

200. See *supra* pp. 676-7.

denied, the agency must promptly notify the petitioner of the reasons for the denial.²⁰¹ And any interested person may appear before the agency in regard to an order.²⁰²

CONCLUSION

There can now be little doubt that the first wave of enthusiasm for the Administrative Procedure Act as a charter of protection against government bureaus exaggerated the changes that would be enforced by the Act. Most of the Act either codifies existing law or addresses itself to agency discretion. To an even greater extent it duplicates existing agency practice.²⁰³

Certain definite new requirements have been made, nevertheless. The Act's important changes in administrative law may be summarized as follows: (1) the trial examiner has been placed in a more responsible and independent position by Civil Service Commission supervision of his appointment, promotion, and removal, by guaranteeing him considerable procedural powers at hearings, and by a separation of functions (in some cases) that removes him from any influence of prosecutory or investigatory personnel; (2) agencies are required to publish all general rules, even though of no legal effect, including a description of organization and procedure; (3) public procedures are required in most cases of substantive rule making; (4) all parties to agency proceedings and all persons compelled to appear before an agency are guaranteed the right to counsel; (5) subpoenas must be issued equally to all parties to agency proceedings; (6) in all formal adjudications there must be an intermediate decision to which the parties may except; and (7) reasons must accompany all denials of requests.

The Act's two fundamental distinctions, between rule making and adjudication and between formal and informal proceedings, are bound to create litigation, for no discretion is given the agency to decide in which category its proceedings fall. Whenever an agency uses a procedure less than that of formal adjudication, there will be an opportunity for a disappointed party or injured person to claim on judicial review that more formal procedures should have been followed. It has been seen how far from clear the distinctions are. The statutory language in distinguishing rule making and adjudication is absolutely useless and the legislative history goes little

201. See *supra* pp. 688-9.

202. See *supra* pp. 687-8.

203. In addition to the two agencies discussed at length, it has been noted that the Act will change SEC procedure only to the extent of requiring fuller publication of advisory opinions intended for general guidance and use of special trial examiners in formal adjudications. Though intermediate decisions have often been omitted in SEC formal adjudications, it is believed that in most cases they would be waived by the parties in the interest of speedy disposition. The Bureau of Internal Revenue has been noted to be required only to give fuller notice before making rules (which notice may be omitted under special conditions) and to employ special trial examiners in Alcohol Tax Unit formal adjudications. All tax adjudications are exempted from formal-adjudication requirements by being triable *de novo* in the Tax Court. Sec. 5. Senate Report at 28; House Report at 45.

further than calling adjudications everything that is traditionally adjudication. The statutory language of the distinction between formal and informal proceedings is unsatisfactory in that the use of the phrase "required by statute" to be determined on a hearing record gives refuge to those agencies whose statutes do not specifically require such proceedings, whereas the legislators undoubtedly intended to include proceedings in which the courts have decided that decision must be confined to a hearing record.²⁰⁴

There is further opportunity for litigation in the exemption of the "agency" from the separation of functions and from the requirement of special trial examiners, because in the context of those exemptions it is clear that the word "agency" does not include all it is defined to include in Section 2(a). A like trouble may arise in the case of boards which at present preside at certain formal proceedings. In exempting boards specially set up "pursuant" to statute from being replaced by the special trial examiners, the Act is so vague as easily to encompass an agency opinion that a certain board is exempt and a disappointed party's opinion that the board is not exempt.

Perhaps most controversial of all, at first, will be the interpretation of Section 10 on judicial review. The view giving teeth to the section will be argued by every disappointed party looking for a means of reversing the agency decision.

Though the new legal requirements are not extensive, agencies will without doubt make every effort to comply with the Act's spirit as set forth in the committee reports and the provisions addressed to agency discretion, if only to forestall further legislation by a Congress which has shown itself ready and willing to impose more stringent measures if these are deemed to have failed.

204. Substitution of the word "law" for the word "statute" in § 4(b) and § 5 would make this a less controversial distinction.

APPENDIX
CHART OF ADMINISTRATIVE PROCEDURE ACT

	Rule Making	Adjudication
Informal	<p>All: publication—§ 3(a); petitions to alter rules—§ 4(d).</p> <p>Substantive only: notice, participation, statement of "basis and purpose," 30-day delay between publication and taking effect—§ 4.</p>	
Formal	<p>All: publication—§ 3(a); petitions to alter rules—§ 4(d).</p> <p>Substantive only: notice—§ 4 (a); hearing—§§ 7, 11; intermediate and final decision—§ 8; 30-day delay between publication and taking effect—§ 4(c).</p>	<p>Notice, informal settlement, separation of functions—§ 5; hearing—§§ 7, 11; intermediate and final decision—§ 8; declaratory orders—§ 5(d).</p>

General Provisions

- § 3—Public information.
- § 6—Ancillary matters: right to counsel, appearances, subpoenas, denials.
- § 9—Sanctions and powers, license revocations.
- § 10—Judicial review: availability, interim relief, scope.
- § 12—Construction and effect, dates of taking effect, separability clause.